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Balbeer Singh a/l Karam Singh & Ors v Sentul Raya Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–1490–07 OF 2012

ABDUL WAHAB PATAIL, ZAWAWI SALLEH AND UMI KALTHUM JJCA

12 JUNE 2014

Contract — Damages — Specific performance — Damages in lieu of specific performance — Whether assessment in accordance with law

Contract — Damages — Mitigation — Duty to mitigate — Breach of sale and purchase agreement to sell property — Contract becoming incapable of being specifically enforced — Whether purchasers mitigated their losses — Determination of time when duty to mitigate arises

Contract — Sale and purchase of property — Breach — Specific performance — Damages in lieu of specific performance — Computation of damages — Whether purchaser justified in insisting on performance of contract — Contract becoming incapable of being specifically enforced — Whether purchaser entitled to liquidated damages and loss of enhancement of value of property — Whether purchaser took reasonable steps to mitigate losses — Specific Relief Act 1950 s 28

Contract — Specific performance — Sale and purchase of property — Damages — Whether damages can be awarded in lieu of specific performance — Specific Relief Act 1950 ss 18 & 28

The respondent had entered into various sales and purchase agreements ('SPA') in respect of units in Villa Perhentian Condominium with the appellants respectively. After completing some 30 percent of the construction works, the respondent suspended all construction works on the grounds that the respondent's holding company had embarked on a corporate restructuring exercise. The respondent offered, by letters 11 August 2000, 18 August 2000, 26 July 2002 and 12 February 2002, to refund of all monies paid towards the purchase price, but the appellants declined. The respondent then abandoned the Villa Perhentian Condominium and built another condominium named 'the Saffron' on the same site. The Saffron was launched in 2006. The respondent contended that the failure to complete the construction of the Villa Perhentian Condominium was due to the global economic crisis. The appellants thus commenced legal proceedings claiming specific performance

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and/or damages in lieu thereof. The High Court, in lieu of specific performance, awarded damages of RM120,000 for each SPA and ordered the respondent to refund all payments made towards the purchase price. The appellants appealed against that decision contending that since as at the date of filing of the claim the units purchased could not be delivered, the appellants were entitled to liquidated and ascertained damages. Further, the appellants contended that they were entitled to damages to be assessed for the loss of the enhancement of value of the units. The appellants claimed that the market value of the units were RM497,000 and the general damages may be calculated as the difference between the market value and the purchase price, thus ranging from RM297,340 to RM311,540.

Held, allowing the appeal with costs:

(1) Section 28 of the Specific Relief Act 1950 ('the Act') applies where the suit is only for specific performance, and s 28 does not apply to restrict s 18 of the Act which specifically authorises any person suing for specific performance to seek compensation for its breach, either in addition to, or in substitution for, its performance. Therefore, the appellants, having prayed for damages, were entitled to consideration for damages even if their prayer for specific performance was dismissed. Further, s 18(5) provides that the jurisdiction conferred under s 18 may be exercised notwithstanding that the contract, as in this case, had become incapable of performance (see para 15).

(2) A court should not be deterred from awarding a sum as damages merely because it appears colossal. The court must assess the damages in accordance with law and established principles. It cannot rewrite a contract itself so that the damages becomes affordable to a defendant. A party not in breach is entitled to damages that the party is entitled to under the law. The appellants were entitled to refuse the refund of deposits or payments made and seek what was due under their respective SPAs (see para 17).

(3) A plaintiff is under a duty to take reasonable steps to mitigate the loss consequent upon a defendant's wrong. In this case, the appellants could have taken steps to mitigate their losses when it became certain that the Villa Perhentian Condominium was not merely suspended but would not be completed at all. In the absence of evidence when they became aware, the best available evidence was the date of the last offer to them to refund the payments they had made, ie 26 July 2002. This applied in respect of the period for which liquidated ascertained damages for delay was payable (see para 17).

(4) As to specific performance, the respective SPAs had become incapable of performance through no fault or breach of the appellants. No evidence was adduced why, after recovery from the global financial crisis, the

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suspended Villa Perhentian Condominium could not be revived. Instead, the respondent elected, in 2006, to launch 'The Saffron'. The facts showed that the respondent chose to breach the SPAs with the appellants. Clearly, pursuant to s 18(5) of the Act, the court was not precluded from awarding damages. It was appropriate, in the circumstances, that such compensation be assessed by the deputy registrar of the High Court by comparison with an average market values of comparable units in the vicinity and deducting therefrom the purchase price under the SPAs in each case (see para 19).

(5) The order of damages in the sum of RM120,000 was set aside and substituted with the amounts for liquidated and ascertained damages pursuant to cll 22(2) and 24(2) from 36 months from the date of the respective SPAs to 26 July 2002. General damages were to be assessed from the date of judgment till the date of settlement. The order for the return of the deposits was affirmed (see para 20).

[Bahasa Malaysia summary

Responden telah memasuki perjanjian-perjanjian jual beli ('PJB') berkaitan unit-unit di Kondominium Villa Perhentian masing-masing dengan perayu-perayu. Selepas menyiapkan 30 peratus daripada kerja-kerja pembinaan, responden menggantung kesemua kerja-kerja pembinaan atas alasan bahawa syarikat pemegangan responden telah memulakan pelaksanaan susun semula korporat. Responden menawarkan, melalui surat-surat 11 Ogos 2000, 18 Ogos 2000, 26 Julai 2002 and 12 Februari 2002, untuk membayar balik kesemua wang yang dibayar kepada harga belian, tetapi perayu menolak. Responden kemudiannya meninggalkan Kondominium Villa Perhentian dan membina kondominium yang lain bernama 'The Saffron' atas tapak yang sama. Saffron dilancarkan pada tahun 2006. Responden berhujah bahawa kegagalan untuk menyiapkan pembinaan Kondominium Villa Perhentian adalah akibat daripada krisis ekonomi global. Perayu-perayu oleh itu memulakan prosiding undang-undang menuntut pelaksanaan spesifik dan/atau ganti ruginya sebagai ganti. Mahkamah Tinggi, sebagai ganti pelaksanaan spesifik, mengawardkan ganti rugi sebanyak RM120,000 untuk setiap PJB dan memerintahkan responden untuk membayar balik kesemua bayaran yang dibuat kepada harga belian. Perayu-perayu merayu terhadap keputusan tersebut dengan berhujah bahawa memandangkan pada tarikh pemfailan tuntutan tersebut unit-unit yang dibeli tidak dapat dihantar, perayu-perayu berhak bagi ganti rugi yang ditentukan dan ditetapkan. Selanjutnya, perayu-perayu berhujah bahawa mereka berhak kepada ganti rugi untuk ditaksirkan bagi kerugian penambahan nilai unit-unit tersebut. Perayu-perayu mendakwa bahawa nilai pasaran unit-unit sebanyak RM497,000 dan ganti rugi am boleh dikira sebagai perbezaan di antara nilai pasaran dan harga belian, oleh itu antara RM297,340 sehingga RM311,540.

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Diputuskan, membenarkan rayuan dengan kos:

(1) Seksyen 28 Akta Relief Spesifik 1950 ('Akta') diguna pakai di mana tindakan hanya untuk pelaksanaan spesifik, dan s 28 tidak diguna pakai untuk mengehadkan s 18 Akta yang secara spesifik memberikan kuasa kepada mana-mana individu yang menyaman bagi pelaksanaan spesifik untuk mendapatkan pampasan untuk kemungkirannya, sama ada dalam tambahan kepada, atau sebagai ganti untuk, pelaksanaannya. Oleh itu, perayu-perayu dengan memohon kepada ganti rugi, adalah berhak untuk balasan bagi ganti rugi walaupun permohonan mereka untuk pelaksanaan spesifik ditolak. Selanjutnya, s 18(5) memperuntukkan bahawa bidang kuasa yang diberikan di bawah s 18 boleh dilaksanakan tanpa mengambil kira bahawa kontrak tersebut, seperti dalam kes ini, telah tidak dapat dilaksanakan (lihat perenggan 15).

(2) Mahkamah tidak patut dihalang daripada mengawardkan jumlah ganti rugi hanya kerana ia dilihat banyak. Mahkamah mesti taksir ganti rugi mengikut undang-undang dan prinsip-prinsip yang ditetapkan. Ia tidak boleh menulis semula kontrak dengan sendirinya dengan itu defendan mampu membayar ganti rugi. Pihak yang bukan dalam kemungkiran berhak kepada ganti rugi yang layak di bawah undang-undang. Perayu-perayu berhak untuk menolak bayaran pengembalian semula deposit atau bayaran yang dibuat dan memohon apa yang tertunggak kepada mereka di bawah PJB mereka masing-masing (lihat perenggan 17).

(3) Plaintif adalah bertanggungjawab untuk mengambil langkah-langkah munasabah untuk meringankan kerugian akibat kesilapan defendan. Dalam kes ini, perayu-perayu sepatutnya mengambil langkah-langkah untuk meringankan kerugian mereka apabila adalah menjadi jelas bahawa Kondominium Villa Perhentian bukan sahaja digantung bahkan tidak akan disiapkan langsung. Dalam ketiadaan keterangan apabila mereka mengetahui perkara ini, keterangan terbaik yang ada adalah tarikh tawaran terakhir kepada mereka untuk membayar balik bayaran yang dibuat oleh mereka, iaitu 26 Julai 2002. Ini diguna pakai berkaitan tempoh di mana ganti rugi yang ditentukan dan ditetapkan kerana lewat boleh dibayar (lihat perenggan 17).

(4) Berkaitan pelaksanaan spesifik, PJB masing-masing tidak dapat dilaksanakan bukan atas kesalahan atau kemungkiran perayu-perayu. Tiada keterangan dikemukakan mengapa, selepas pulih daripada krisis kewangan golabal, Kondominium Villa Perhentian yang digantung tidak boleh dimulakan semula. Sebaliknya, responden memilih, pada tahun 2006, melancarkan 'The Saffron'. Fakta menunjukkan bahawa responden memilih untuk memungkiri PJB dengan perayu-perayu. Jelas, berikutan s 18(5) Akta, mahkamah tidak dikecualikan daripada mengawardkan ganti rugi. Adalah wajar, dalam keadaan ini, bahawa

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pampasan sedemikian ditaksir oleh timbalan pendaftar Mahkamah Tinggi melalui perbandingan dengan nilai pasaran purata unit-unit yang boleh dibandingkan di dalam kawasan dan ditolak daripadanya harga belian di bawah PJB dalam setiap kes (lihat perenggan 19).

(5) Perintah ganti rugi berjumlah RM120,000 diketepikan dan digantikan dengan jumlah untuk ganti rugi yang ditentukan dan ditetapkan berikutan klausa 22(2) dan 24(2) daripada 36 bulan dari tarikh PJB masing-masing sehingga 26 Julai 2002. Ganti rugi am ditaksirkan dari tarikh penghakiman sehingga tarikh penyelesaian. Perintah untuk bayaran deposit adalah disahkan (lihat perenggan 20).]

Notes

For a case on breach, see 3(3) *Mallal's Digest* (4th Ed, 2013 Reissue) para 6308.
For cases on mitigation, see 3(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 4321–4340.
For cases on sale and purchase of property, see 3(3) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 6448–6449.
For cases on specific performance, see 3(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 4385–4387.

Cases referred to

Cukurova Finance International Limited & Cukurova Holdings AS v Alfa Telecom Turkey Limited [2013] UKPC 20, PC (refd)
Ganam d/o Rajamany v Somoo s/o Sinniah [1984] 2 MLJ 290; [1984] 1 CLJ 123, FC (refd)
Lee Poh Choo v SEA Housing Corporation Sdn Bhd [1982] 1 MLJ 324 (refd)
Leong Lai Kuen v Sentul Murni Sdn Bhd [2004] 5 CLJ 25, HC (refd)
SEA Housing Corporation Sdn Bhd v Lee Poh Choo [1982] 2 MLJ 31, FC (refd)
Sentul Raya Sdn Bhd v Hariram a/l Jayaram & Ors [2008] 4 MLJ 852, CA (refd)

Legislation referred to

Contracts Act 1950 s 75
Housing Development (Housing Development Account) Regulations 1991
Housing Development (Control and Licensing) Regulations 1989
Housing Development (Control and Licensing) Act 1966
Specific Relief Act 1950 ss 18(2), (5), 28

Appeal from: Civil Suit No S1–22–1110 of 2005 (High Court, Kuala Lumpur)

Harpal Singh Grewal (Amar Dass and Reny Rao with him) (PS Sohanpal & Sidhu) for the appellants.
Woon Ling Li (Mohd Izral Khairy with her) (Izral Partnership) for the respondent.

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Abdul Wahab Patail JCA (delivering judgment of the court):

[1] The appellants, Balbeer Singh a/l Karam Singh and six others, appealed to this court against the decision of the High Court made on 29 May 2012 in respect of their claim against the respondent company Sentul Raya Sdn Bhd.

[2] In their statement of claim, the appellants as plaintiffs had sought the following orders:

(a) specific performance and/or damages in lieu thereof;

(b) that the defendant do pay the plaintiffs special damages;

(c) that the defendant do pay each and every one of the plaintiffs abovenamed (second and third plaintiffs jointly and fifth and sixth plaintiffs jointly) general damages and/or exemplary damages in the amount of RM350,000;

(d) that the defendant do pay the plaintiffs interest at a rate to be determined by this honorable court;

(e) that the defendant do pay the plaintiffs costs of the action; and

(f) any such other and further relief as may be just and equitable in the circumstances.

[3] The draft order showed the High Court had ordered that:

(1) ... tuntutan Plaintif-Plaintif untuk perlaksanaan specific ditolak;

(2) sebagai balasan kesemua Plaintifyang dirujuk dalam kelima Perjanjian Jual Beli di beri gantirugi sebanyak RM120,000 bagi setiap perjanjian jual-beli;

(3) Defendan memulangkan deposit dan bayaran pendahuluan yang telah dijelaskan sebanyak 30% dari harga jualan;

(4) faedah pada kadar 4% setahun dari tarikh tuntutan bermula sehingga tarikh penghakiman; dan

(5) kos sebanyak RM40,000 (Ringgit Malaysia Empat Puluh Ribu).

[4] The background facts of this case may be summarised as follows:

(a) the respondent entered into sales and purchase agreements ('SPA') in respect of units in Villa Perhentian Condominium with the first, second and third appellants jointly; fourth, fifth and sixth appellants jointly; and the seventh appellant on 9 December 1996 (RM196,660), 9 December 1996 (RM199,660), 13 November 1996 (RM189,460), 27 November 1996 (RM185,460,00) and 13 November 1996 (RM189,460) respectively;

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(b) cl 22(1) thereof provided for delivery of vacant possession within thirty six months from the date of the respective SPA's, ie between November to December 1999;

(c) cll 22(2) and 24(2) thereof provided for liquidated damages in the event of delay;

(d) the appellants paid on all progress payment claims;

(e) sometime at the end of January, after completing some 30 percent of the construction works, the respondent suspended all construction works;

(f) the appellants were informed that the respondent's holding company, Taiping Consolidated Sdn Bhd had embarked on a corporate restructuring exercise;

(g) the respondent offered, by letters 11 August 2000, 18 August 2000, 26 July 2002 and 12 February 2002, to refund of all monies paid towards the purchase price, amounting to RM58,998, RM59,698, RM56,838, RM55,638, RM56,834 respectively, but the appellants declined;

(h) the second to seventh appellants were issued with notices of demand dated 3 October 2001 for the third progress payment pursuant to cl 9(2);

(i) the first appellant made immediate payment;

(j) the second and third appellants paid on 16 October 2001;

(k) the fourth appellant paid on 10 October 2001;

(l) the fifth and sixth appellants paid by Cashier's Order No 027075;

(m) the seventh appellant paid on 10 October 2001;

(n) the respondent abandoned the Villa Perhentian Condominium and built another condominium named 'the Saffron' on the same site, for sale;

(o) the appellants filed their claim on 21 September 2005; and

(p) the Saffron was launched in 2006.

[5] Upon that background, the parties proceeded to argue that:

(a) the failure to complete the construction of the Villa Perhentian Condominium was due to the global economic crisis of 1997/1998;

(b) the respondent had offered refund of monies paid and alternative units at discounted prices;

(c) the respondent disputed the appellants' readiness, willingness and ability to complete their purchase and settle the balance of the purchase price;

(d) only the second, third, fifth and sixth appellants had secured loan financing in 1998 to fund their purchase;

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(e) the respondent only launched the Saffron condominium in 2006; and

(f) since the appellants' claim was instituted on 21 September 2005, their failure to make application to restrain or prohibit the respondent from proceeding with the Saffron condominium, meant that they have effectively abandoned their claim for specific performance.

[6] In its grounds of judgment, the High Court took into consideration and reasoned, inter alia, as follows:

(a) cll 22(1) and 24(1) of the SPA contractually obligated the respondent to complete the construction and deliver vacant possession within thirty six months from the respective dates of the SPA;

(b) it was undisputed that the respondent ceased works on the Villa Perhentian Condominium as early as January 1998 as at the scheduled completion date in December 1999 and at the date of institution of proceedings, the respondent was clearly in breach of its contractual obligations under the SPA;

(c) the issue of notices of demand dated 3 October 2001 for billing at the end of third stage of construction, and accepting that the appellants made payment thereon, conferred reasonable and legitimate expectation on the appellants of the respondent's ability to perform and fulfil their contractual obligation in accordance with the terms of the SPA, and thus were accordingly justified in their reliance on the respondent's clear and unequivocal representation of due delivery of units purchased under the SPA;

(d) but despite the respondent's creation of a legitimate expectation that the units would be completed and handed over as agreed, the respondent failed to deliver;

(e) the appellants were merely verbally informed that the Villa Perhentian Condominium would be scrapped, but during the long period of suspension the respondent did not notify nor alert the appellants of the intended abandonment of the Villa Perhentian Condominium;

(f) the letters offering refunds as late as 26 July 2002 and 12 August 2002 did not contain any notification that the Villa Perhentian Condominium would not be completed;

(g) the defence of frustration by the global economic crisis of 1997–1998 was rejected because the respondent replaced the abandoned Villa Perhentian Condominium with 'the Saffron', which shows that the economic crisis clearly did not frustrate the execution of construction works on the site since notwithstanding the crisis, the respondent was able to replace the earlier development with a revised high end condominium to their benefit and apparent advantage;

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(h) the appellants were clearly ready, willing and financially capable, of continuous performance of their respective contractual obligation under the SPA, and could not be faulted and were not guilty of any lapses or failing in the performance of their contractual obligation;

(i) the respondent's offers of refund monies and of alternative units, had consistently and persistently been rejected;

(j) however, it was also clear that at the date of the institution of legal proceedings on 21 September 2005, the Villa Perhentian Condominium had remained largely uncompleted;

(k) given the stage of completion of the Villa Perhentian Condominium which had merely attained 30% at the material time of the defendant's cessation of construction works, and given the ensuing substantial termination of the sales and purchase agreements by the majority of purchasers of units in the Villa Perhentian Condominium, it must be apparent to any 'reasonable and fair minded person that plaintiffs' persistent and adamant insistence for specific performance and delivery of vacant possession of the property was, but a futile quest. The High Court accordingly disallowed plaintiffs' claim for specific performance of 'the SPA' and, in lieu, allowed damages as prayed in para 30(1) of plaintiffs' statement of claim;

(l) held that given the peculiarity and special circumstances of the case, damages was a more appropriate remedy to address the appellants' grievance and loss;

(m) the respondent had completed a relatively nominal stage of the Villa Perhentian Condominium construction at the material time and the majority of the purchasers had terminated their SPA At the material time of the suit, the replacement of the Villa Perhentian Condominium, the Saffron, was nearing completion and about to be launched;

(n) the appellants had paid a relatively nominal fraction of the total purchase price and in the light of the substantial termination of 'the SPA' by the majority of the purchasers as early as 2001–2002, the futility of insistence on specific performance of the SPA ought reasonably have been within the appellants' contemplation;

(o) despite insistence for specific performance, no actions were found to have been taken to restrain or prohibit the development of the 'revised' Villa Perhentian Condominium, 'the Saffron', which was launched in 2006;

(p) '8.5 Therefore, despite plaintiffs' undisputed apparent continuous readiness and capability to complete 'the SPA', the glaring reality on the ground was that, the defendant unlike the plaintiffs was not equally ready or capable to execute the same. The court, having regard to the facts and surrounding circumstances of this case, finds that this is a fit and proper

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case not to grant plaintiffs' claim for specific performance of 'the SPA' and, accordingly in lieu of specific performance awarded the plaintiffs, compensatory damages for the stated sum of RM120,000 against each SPA';

(q) 'The Saffron' was clearly an entirely different development with different contractual terms including different description, specification and purchase prices. Assessment of damages on the basis of value of 'The Saffron' is misconceived. The value of 'The Saffron' unit at RM497,000 is irrelevant;

(r) noted the amounts claimed under liquidated ascertained damages and the further claims of RM300,000 as loss of profit and exemplary damages of RM350,000, and held that in the absence of evidentiary proof of damages and losses, the claim for loss of profit of RM300,000 for each unit, and RM350,000 for exemplary damages constitute bare claims;

(s) though the appellants were legally entitled to liquidated ascertained damages pursuant to cll 22(2) and 24(2) of the SPA, the long period of abandonment of works make apparent the inevitable and imminent abandonment of the Villa Perhentian Condominium. The court accepted the appellants' underlying reason for continuous insistence and claim for specific performance was futile, and in view of the respondent's clear inability to continue their contractual obligation, as early as 2001–2002 when defendant's offers of refund were effected, the appellants owed a duty to mitigate their losses. Thus, they should not under the guise of keeping the SPA alive be allowed to benefit continuously and indefinitely from the respondent's clear contractual liability to pay liquidated ascertained damages pursuant to the calculation provided in the SPA.

(t) accordingly, the High Court in lieu of specific performance, awarded damages in favour of the plaintiffs for the amount of RM120,000 ordered the respondent to refund to the respective appellants all payments made towards their purchase, with interest and costs in the sum of RM400,000;

(u) the appellants' steadfast and unyielding insistence for the Villa Perhentian Condominium completion, is unreasonable and unrealistic, and 'Given the stark and glaring reality of the defendant's inevitable Villa Perhentian Condominium incompletion, it would be unjust and inequitable for the court to award damages for the amount as were prayed by the plaintiffs.'

SUBMISSIONS FOR THE APPELLANTS

[7] In the appeal, the point was made for the appellants that:

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(a) since as at the date of filing of the claim the units purchased could not be delivered, the appellants are entitled to liquidated and ascertained damages. Further, the instant case is also distinguishable from cases of merely delayed delivery. In this case, no unit is delivered and the appellants are entitled, in lieu of specific performance, to damages to be assessed for the loss of the enhancement of value of the units had they been delivered;

(b) *Sentul Raya Sdn Bhd v Hariram a/l Jayaram & Ors* [2008] 4 MLJ 852 (FC), at p 860 established that additional remedies are not excluded under the Housing Developers (Control and Licensing) Act 1966 and Regulations 1989 and 1991;

(c) the High Court in *Lee Poh Choo v SEA Housing Corporation Sdn Bhd* [1982] 1 MLJ 324 and approved by the Federal Court in *SEA Housing Corporation Sdn Bhd v Lee Poh Choo* [1982] 2 MLJ 31 (FC) established that a claim for loss of use and enjoyment of the building by way of rental is maintainable; and

(d) per the valuation report of one Mr Lee Pak Ling (PW3), the market value of the units were RM497,000 and the general damages may be calculated as the difference between the market value and the purchase price, thus ranging from RM297,340 for the second and third appellants to RM311,540 for the fifth and sixth appellants.

[8] Accordingly, it was prayed that:

(a) the order of damages in the sum of RM120,000 be set aside, and be substituted with the amounts for liquidated and ascertained damages pursuant to cll 22(2) and 24(2);

(b) general damages as calculated above be ordered with interest from the date of judgment till the date of settlement; and

(c) the order for the return the deposits be affirmed except that interest be ordered thereon from the date the deposits paid to the respondent till date of recovery.

[9] The above prayers at the appeal made it clear that the appellants accepted the dismissal of their prayer for specific performance, special damages and exemplary damages.

SUBMISSIONS FOR THE RESPONDENT

[10] In the light of the above, it is necessary only to consider that part of the submissions for the respondent in reply and on the respondent's cross appeal, on the issues whether:

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(a) an award of general damages may be made after refusing specific performance in the absence of a pleaded case for damages;

(b) the award of RM120,000 as damages in the absence of any evidence and/or submissions by the parties is arbitrary;

(c) the High Court erred:

(i) in ordering refund in addition to damages;

(ii) in failing to follow the decision in *Ganam d/o Rajamany v Somoo s/o Sinniah* [1984] 2 MLJ 290; [1984] 1 CLJ 123; and

(iii) in ordering interest to be calculated from 21 September 2005 (date of the action was filed) until the date of judgment.

[11] In the submissions on the above, the point made for the respondent may be summarised as follows:

(a) this was a case where the appellants were keeping their respective SPA's alive and seeking to reap benefit from the liquidated and ascertained damages provision, when they knew that the Villa Perhentian Condominium was abandoned; and

(b) calculation of the damages on the value of 'The Saffron' is misconceived, as 'The Saffron' is different from the Villa Perhentian Condominium and was launched in 2006.

OUR REASONING AND CONCLUSION

[12] Section 28 of the Specific Relief Act 1950 provides as follows:

> Bar of suit for breach after dismissal
>
> 28 The dismissal of a suit for specific performance of a contract or part thereof shall bar the plaintiff's right to sue for compensation for the breach of the contract or part, as the case may be.

[13] On the other hand s 18 of the same Act provides:

> Power to award compensation in certain cases
>
> 18
>
> (1) Any person suing for the specific performance of a contract may also ask for compensation for its breach, either in addition to, or in substitution for, its performance.
>
> If in any such suit the court decides that specific performance ought not to be granted, but that there is a contract between the parties which has been broken by the defendant and that the plaintiff is entitled to compensation for that breach, it shall award him compensation accordingly.

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ILLUSTRATION

...

(3) If in any such suit the court decides that specific performance ought to be granted, but that it is not sufficient to satisfy the justice of the case, and that some compensation for breach of the contract should also be made to the plaintiff, it shall award him such compensation accordingly.

ILLUSTRATION

(4) Compensation awarded under this section may be assessed in such a manner as the court may direct.

(5) The circumstance that the contract has become incapable of specific performance shall not preclude the court from exercising the jurisdiction conferred by this section.

ILLUSTRATION

(a) A, a purchaser, sues B, his vendor, for specific performance of a contract for the sale of patent. Before the hearing of the suit the patent expires. The court may award A compensation for the non-performance of the contract, and may, if necessary, amend the plaint for that purpose.

(b) A sues for the specific performance of a resolution passed by the directors of a public company, under which he was entitled to have a certain number of shares allotted to him, and for compensation for the non-performance of the resolution. All the shares had been allotted before the institution of the suit. The court may, under this section, award A compensation for the non-performance.

[14] In our view, there is no conflict between ss 18 and 28. Section 28 applies where the suit is only for specific performance, and s 28 does not apply to restrict s 18 which specifically authorises any person suing for specific performance to seek compensation for its breach, either in addition to, or in substitution for, its performance. In the instant appeal, the appellants had sought the reliefs referred to in para 2 above:

[15] We hold, therefore, that the appellants, having prayed for damages, are entitled to consideration for damages even if their prayer for specific performance was dismissed. Further, s 18(5) provides that the jurisdiction conferred under s 18 may be exercised notwithstanding that the contract, as in this case, had become incapable of performance.

[16] Counsel for the respondent submitted upon the concern that the appellants were keeping their respective SPA's alive in order to reap benefit from the liquidated ascertained damages. Counsel relied upon *Leong Lai Kuen v Sentul Murni Sdn Bhd* [2004] 5 CLJ 25, where the headnotes state as follows:

[1] Based on the authorities, the plaintiff had a right to claim for damages specified under a rescinded contract. However, the claim for liquidated damages for non-delivery of vacant possession would be subjected to s 75 of the Contracts Act

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> 1950. The plaintiff was only entitled to receive from the defendant reasonable compensation not exceeding the amount so named or the penalty stipulated for. The court has to decide what is reasonable. Otherwise, damages due to a purchaser under the formulated method of calculation stipulated in the agreement may amount to a colossal sum for an abandoned project. The purchaser may refuse to rescind or choose to rescind at a very late stage so as to enjoy the higher rate of calculating compensation, (pp 31 b & 32 d-h).

[17] We do not think that a court should be deterred from awarding a sum as damages merely because it appears colossal. More to the point is that the court must assess the damages in accordance with law and established principles. It cannot rewrite a contract itself so that the damages becomes affordable to a defendant. A party not in breach is entitled to damages that the party is entitled to under the law. The appellants were entitled to refuse refund of deposits or payments made and seek what is due under their respective SPA's. However, it is a settled principle that a plaintiff is under a duty to take reasonable steps to mitigate the loss consequent upon a defendant's wrong. In this case, the appellants could have taken steps to mitigate their losses when it became certain that the Villa Perhentian Condominium was not merely suspended but would not be completed at all. When the appellants became aware of it is only known to them. In the absence of evidence when they became aware, the best available evidence is the date of the last offer to them to refund the payments they had made, ie 26 July 2002. This applies in respect of the period for which liquidated ascertained damages for delay is payable.

[18] As to the rate for liquidated ascertained damages, the terms of the SPA's were not dictated by the appellants, but, including the term as to the rate for liquidated ascertained damages, was from the respondent. Whether the rate was too high has not been raised in issue by either party. Hence, it does not call for consideration of the application of s 75 as in *Leong Lai Kuen v Sentul Murni Sdn Bhd*. We bear in mind the opinion of the Judicial Committee of the Privy Council in *Cukurova Finance International Limited & Cukurova Holdings AS v Alfa Telecom Turkey Limited* [2013] UKPC 20 in relation to submissions as to a high rate of interest:

> As for the high rate of interest, it is true that 8% over LIBOR does strike me as steep, especially for a secured loan, but a lawyer's assessment, even (or, perhaps, all the more) a judge's assessment, of a particular contractual interest rate is of questionable value. The rate of 8% over LIBOR is the rate which was agreed between the parties, both very large commercial companies, after arm's length negotiations. It is therefore scarcely reasonable for CH and CFI to complain of the rate continuing to apply, unless there is a special factor at work. No special factor has been identified here.
>
> While the same points can be made about the default interest rate of 11.5% above LIBOR as about the basic rate of 8% over LIBOR, there could be a question as to whether the extra 3.5% was a penalty, from which relief could be granted. In

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addition to the equity of redemption and relief from forfeiture, equity developed a jurisdiction to relieve against penalties. While a default interest rate may be a penalty against which equity will relieve (see eg *Stanhope v Manners* (1763) 2 Eden 199), it was not argued that the extra 3.5% per annum in this case could be so treated. It seems to me that this was realistic on the part of Mr MacLean. Particularly in the context of a contractual rate of 8% over LIBOR, the default rate in the present case, which predicates an increased risk due to the very existence of a default, could not, I think, fairly be characterized as penal, at least on its own.

As to the length of the period for which this rate of interest is to run, it cannot be doubted that six years between forfeiture and relief is a very long time indeed for a gap between a tender of the mortgage debt and the court upholding the mortgagor's right to redeem. However, most of the delay can fairly be said to be attributable to CH and CFI, albeit not in the sense of any wrong-doing on their part.

[19] As to specific performance, quite obviously the respective SPA's have become incapable of performance through no fault or breach of the appellants. No evidence was adduced why, after recovery from the global financial crisis, the suspended Villa Perhentian Condominium could not be revived. Instead, the respondent elected, in 2006, to launch 'The Saffron'. In a real sense, the facts show that the respondent chose to breach the SPA's with the appellants. Clearly, pursuant to s 18(5) of the Act, the court is not precluded from awarding damages, and pursuant to s 18(2), holding that in the circumstances of impossibility specific performance ought not to be granted, but that there being a contract between the parties which has been broken by the respondent and that the appellants are entitled to compensation for that breach, the court must award compensation accordingly in lieu of specific performance. It is appropriate, in the circumstances, that such compensation be assessed by the deputy registrar of the High Court by comparison with an average market values of comparable units in the vicinity and deducting therefrom the purchase price under the SPA's in each case. We are mindful that the appellants paid 30%, but they were not the parties in breach. Further, there is no evidence that they are in any difficulty to make payment had the Villa Perhentian Condominium been completed and delivered as agreed.

[20] We, therefore, in respect of the appeal and cross appeal order that :

(a) the order of damages in the sum of RM120,000 be set aside, and be substituted with the amounts for liquidated and ascertained damages pursuant to cll 22(2) and 24(2) from 36 months from the date of the respective SPA's to 26 July 2002 with interest from the date of the writ to date of full settlement;

(b) general damages as assessed with interest from the date of judgment till the date of settlement;

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(c) the order for the return of the deposits is affirmed, with interest thereon from the date the deposits were paid to the respondent till date of recovery;

(d) costs here in the sum of RM10,000; and

(e) deposit to account of costs.

Appeal allowed with costs.

Reported by Kanesh Sundrum